Taib bin Mohamad v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO S–05–51 OF 1994
ABDUL HAMID MOHAMAD, MOHD SAARI AND KC VOHRAH JJCA
14 JUNE 2002

Criminal Law *— Dangerous drugs — Trafficking — Insufficient evidence to prove knowledge of dangerous drugs — Sufficient evidence to presume such knowledge under s 37(d) of the Dangerous Drugs Act 1955 — Whether defence should have been called upon on a charge of possession — Dangerous Drugs Act 1955 s 37(d)*

Criminal Law *— Dangerous drugs — Trafficking — Presumption — Whether a presumption of trafficking in dangerous drugs may be invoked upon a presumption of possession of such drugs — Dangerous Drugs Act 1955 s 37(d) & (da)*

Criminal Law *— Dangerous drugs — Trafficking — Whether act of appellant in throwing a bag constituted knowledge of the contents of the bag*

Evidence *— Statement — Admissibility — Hearsay statement highly prejudicial in effect — Whether such statement admissible and could be relied upon*

The appellant (accused at first instance) was convicted on a charge of trafficking in 2,828g of cannabis under s 39B(1)(a) read with s 39B(2) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death. He appealed. At first instance, the trial judge had invoked a presumption of trafficking upon a presumption of possession. The trial judge did not make a finding from the facts adduced that the accused knew the nature of the drug, at the close of the prosecution's case. He merely relied on the presumption under s 37(d) of the Act and proceeded to invoke the presumption of trafficking under s 37(da) of the Act. The trial judge had also allowed inadmissible and irrelevant evidence highly prejudicial to the accused. The trial judge had admitted as evidence a hearsay statement by a police witness ('PW3') to the effect that he received information that a Filipino Bajau wanted to sell cannabis. An exculpatory statement by the accused showed that the accused was a Filipino Bajau. PW3 also testified that he saw the appellant threw a bag containing the cannabis.

Held, convicting the appellant on a reduced charge of possession of cannabis under s 6 read with s 39A(2)(f) of the Dangerous Drugs Act 1955 and sentencing him to 14 years' imprisonment and ten strokes of the rotan:

(1) The High Court was wrong in invoking the presumption of trafficking upon the presumption of possession. There was also insufficient evidence for the trial judge to infer that the appellant had knowledge that the material seized was cannabis. The trial judge should not have therefore called the appellant to make his

defence on a charge of trafficking. However, there was ample evidence to show that the appellant had not raised any reasonable doubt on the case of the prosecution that he was carrying a bag on the day and time mentioned in the charge and that the bag contained the cannabis. The appellant's defence on a balance of probabilities did not rebut the presumption of knowledge under s 37(d) of the Act. Because of the presumption of knowledge of the drugs raised under s 37(d), the appellant should have been called upon to enter his defence on a charge of possession (see pp 479G, 481A, F–H); *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 followed.

(2) The statement by PW3 was inadmissible and irrelevant evidence. On the basis of *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209, its high prejudicial value could in effect have prejudiced the case for the appellant when he was called to make his defence on the trafficking charge. The prejudicial statement could not therefore be relied upon to infer knowledge of the drugs (see p 479G–H, 481B).

(3) Although PW3 had testified that he saw the appellant throw the bag out, nevertheless the officer who arrested the appellant was not called to explain under what circumstances the bag was thrown. The mere throwing of the bag without more could not constitute knowledge of the contents of the bag. Further, the throwing of the bag did not unequivocally show guilt (see p 481C–D); *Abdullah Zawawi bin Yusof v PP* [1992] 1 MLJ 1 followed.

[Bahasa Malaysia summary

Perayu (tertuduh pada mulanya) telah disabitkan atas pertuduhan mengedar 2,828g kanabis di bawah s 39B(1)(a) dibaca bersama s 39B(2) of the Akta Dadah Berbahaya 1952 ('Akta tersebut') dan telah dijatuhi hukuman mati. Beliau telah membuat rayuan. Pada mulanya, hakim perbicaraan telah menggunakan satu anggapan pengedaran berdasarkan satu anggapan pemilikan. Hakim perbicaraan tidak mendapat satu penemuan daripada fakta-fakta yang dikemukakan bahawa tertuduh mengetahui sifat dadah tersebut, di penutup kes pihak pendakwa. Beliau hanya bergantung kepada anggapan pengedaran di bawah s 37(d) Akta tersebut dan terus menggunakan anggapan di bawah s 37(da) Akta tersebut. Hakim perbicaraan juga telah membenarkan keterangan yang tidak diterima dan tidak relevan yang amat prejudis terhadap tertuduh. Hakim perbicaraan telah menerima sebagai keterangan satu kenyataan dengar cakap oleh saksi pihak polis ('PW3') di mana beliau telah menerima maklumat daripada seorang Bajau berbangsa Filipina yang hendak menjual kanabis tersebut. Satu pernyataan pembebasan oleh tertuduh menunjukkan bahawa tertuduh adalah seorang Bajau

berbangsa Filipina. PW3 juga telah memberi keterangan bahawa beliau melihat perayu membuang satu beg yang mengandungi kanabis. A

Diputuskan, menyabitkan perayu atas pertuduhan memiliki kanabis yang telah dikurangkan di bawah s 6 dibaca bersama s 39A(2)(f) Akta Dadah Berbahaya 1952 dan menjatuhkan hukuman 14 tahun penjara dan sepuluh kali sebatan rotan ke atas beliau: B

(1) Mahkamah Tinggi terkhilaf dalam menggunakan anggapan pengedaran berdasarkan anggapan pemilikan. Juga tiada keterangan yang mencukupi untuk membuat andaian bahawa perayu mempunyai pengetahuan bahawa bahan yang dirampas adalah kanabis. Oleh itu hakim perbicaraan tidak sepatutnya memanggil perayu untuk membuat pembelaan beliau berdasarkan satu pertuduhan pengedaran. Namun begitu, terdapat keterangan yang mencukupi untuk menunjukkan bahawa perayu tidak menimbulkan apa-apa keraguan yang munasabah terhadap kes pendakwaan yang beliau membawa beg pada hari dan masa yang disebutkan dalam kertas pertuduhan dan bahawa beg tersebut mengandungi kanabis. Pembelaan perayu atas imbangan kebarangkalian tidak mematahkan anggapan pengetahuan di bawah s 37(d) Akta tersebut. Oleh kerana anggapan pengetahuan tentang dadah ditimbulkan di bawah s 37(d) Akta tersebut, perayu sepatutnya dipanggil untuk memasukkan pembelaan beliau terhadap pertuduhan pemilikan tersebut (lihat ms 479G, 481A, F–H); *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 diikut. C D E F

(2) Pernyataan oleh PW3 merupakan keterangan yang tidak boleh diterima dan tidak relevan. Berdasarkan *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209, nilai prejudis yang tinggi boleh mengakibatkan berlakunya prejudis ke atas kes bagi pihak perayu apabila beliau telah dipanggil untuk membuat pembelaan beliau terhadap pertuduhan pengedaran tersebut. Pernyataan prejudis tersebut oleh demikian tidak boleh digunakan untuk membuat inferens terdapat pengetahuan tentang dadah tersebut (lihat ms 479G–H, 481B). G

(3) Walaupun PW3 telah memberikan keterangan bahawa beliau telah melihat perayu membuang keluar beg tersebut, namun begitu pegawai yang menangkap perayu tidak dipanggil untuk menerangkan dalam keadaan apa beg tersebut dibuang. Hanya dengan pembuangan beg tersebut tidak boleh membentuk pengetahuan tentang kandungan beg tersebut. Tambahan pula, pembuangan beg tersebut tidak secara taksa menunjukkan rasa bersalah (lihat ms 481C–D); *Abdullah Zawawi bin Yusof v PP* [1992] 1 MLJ 1 diikut.] H I

A **Notes**

For cases on Dangerous Drugs Act 1955 s 37(d) and (da), see 4 *Mallal's Digest* (4th Ed, 200 Reissue) paras 77–91.

For cases on admissibility of statement, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2145–2155.

B

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (folld)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209 (folld)
Mohammad bin Hassan v PP [1998] 2 MLJ 273 (folld)

C

Legislation referred to

Courts of Judicature Act 1964 s 60
Dangerous Drugs Act 1952 ss 6, 37(d), 39A(2)(f), 39(B)(1)(a), 39B(2)

D

Appeal from: Criminal Trial No T(47)–10 of 1994 (High Court, Tawau)

John Kah (*Jayasuriya Kah & Co*) for the appellant.
Vong Poh Fah (AG's Chambers) for the prosecution.

E **KC Vohrah JCA** (delivering the judgment of the court): The appellant ('the accused') was charged with trafficking in 2,828g of cannabis at Jalan Sabindo Satu, Tawau, Sabah on 26 January 1994 in contravention of s 39(B)(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), punishable under s 39B(2) of the Act. The High Court convicted him on the charge F and sentenced him to death. The accused appealed. We set aside the conviction on trafficking and substituted therefore a conviction for the possession of the said drug. We now give our reasons.

This Sabah High Court case was decided in 1994, well before the Federal Court case of *Mohammad bin Hassan v PP* [1998] 2 MLJ 273 which decided in 1997 that it is wrong to rely on a presumption of possession of a G dangerous drug under s 37(d) of the Act to raise a presumption of trafficking in the drug. Here it is obvious that the High Court, on hindsight, was wrong in invoking a presumption of trafficking upon a presumption of possession of the cannabis. The other grave infirmity was that the judge had allowed inadmissible and irrelevant evidence to be adduced in evidence H which was prejudicial to the accused and which on the basis of the Federal Court case of *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 showed that its high prejudicial value could in effect have been to prejudice the case for the accused when he was called to make his defence on the trafficking charge.

The facts showed that acting on information a police party led by I Inspector Hamzah bin Ahmad (PW3), the sole witness to give evidence on the surveillance and ambush on 26 January 1994, laid an ambush at Sabindo Satu Building, Tawau in the area of the staircase at 88, Beauty

Saloon Sabindo at about 7pm. At 7.40pm he saw the accused climbing the stairs towards the place of ambush. He was carrying a plastic bag. An officer of the police party shouted 'Police' and arrested the accused. PW3 saw that after the arrest the accused threw the plastic bag into a corridor. PW3 retrieved the black plastic bag which contained two packages. PW3 tore a bit of the two packages whereupon dried leaves were exposed. The accused was then taken to the anti-narcotic branch office at Tawau together with the bag and the contents. The government chemist ('PW1') who examined the two 'brownish tape' packages that had been seized found each of them to contain a slab of compressed plant material. He conducted an analysis of the plant material and found the material to be cannabis as defined under the Act. Altogether the cannabis weighed 2,828g.

During the trial, a cautioned statement made by the accused was adduced during the prosecution stage of the trial. It was an exculpatory statement by the accused. To be noted is that the statement contained the particulars of the accused which showed he was a 'Suluk Bajau' and that he was a Filipino. In connection with the accused being a 'Suluk Bajau' and a Filipino, one has to take into account the statement of Inspector Hamzah (PW3), which obviously is irrelevant and inadmissible and which he gave in evidence:

> I was told of an information by Detective Gusibih B Ladat, relating to a male person, believed to be a Phillipine, Bajau, who wanted to sell cannabis in the are of 88, Beauty Saloon, Sabindo.

This hearsay statement obviously refers to the accused and is highly prejudicial (see *Alcontara*). We will come to this statement later.

At the close of the prosecution case, the learned judge was of the opinion that the accused was 'in custody or control of the cannabis' and applied the presumption under s 37(d) of the Act that the accused 'knew he was carrying cannabis'. But the learned judge did not make a finding from the facts adduced that the accused knew the nature of the drug to be cannabis; he relied instead on the presumption under s 37(d) of the Act. The learned judge in other words, found the accused to be in possession of the cannabis by virtue of the presumption. He then invoked the presumption of trafficking (under s 37(da) of the Act) since the weight of the cannabis was 2,828g.

The case was decided in 1994. Bearing in mind the case of *Mohammad bin Hassan* decided in 1997, as stated earlier in this judgment, the invoking of the presumption of trafficking upon the presumption of possession is obviously wrong.

In considering the defence, the judge should only have called the accused to make his defence on the charge of the possession of the cannabis based on the presumption under s 37(d) of the Act that he knew that nature of the drug.

We have examined the evidence adduced in the case at the prosecution stage of the trial to see if the facts disclosed that the accused had actual knowledge of the nature of the drugs so that the judge could have relied on

such facts to infer knowledge without resorting to s 37(d) of the Act in which case the invoking of the presumption of trafficking under s 37(da) of the Act would have been correct in law. We did not find sufficient evidence for the judge to infer that the accused had knowledge that the material was cannabis. We have already ruled as inadmissible the highly prejudicial statement by Inspector Hamzah that he had received a bit of information that a Filipino Bajau wanted to sell cannabis and we had noted the fact that the exculpatory statement of the accused showed he was a Filipino Bajau, the highly prejudicial statement cannot be relied upon to infer knowledge of the drugs in the accused. The bag that he carried was a black plastic bag and the packages within it were wrapped in brown tape and it is not possible from that to say that he knew that the material within the packages was cannabis. There was the evidence of PW3 that he saw the accused throw the bag but here we note that he threw the bag on to the corridor area after he was arrested but it is to be noted the officer who arrested him was not called to give evidence to explain under what circumstances the bag was thrown — the mere throwing of the bag without more cannot constitute knowledge of the contents of the bag. To our mind his throwing of the bag, even if true, does not unequivocally show guilt bearing in mind what was stated in *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 by the Supreme Court at p 1:

> The conduct of the appellant in running away when the discovery of the drugs was announced was consistent with his having known of the presence of the drugs in the box before their discovery, indicating hereby a sense of guilt. On the other hand it was conduct equally consistent with the appellant being in a state of pure panic. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way.

There being no evidence from which his knowledge of the drugs could be inferred, the learned judge could not and should not have called the accused to make his defence on the charge of trafficking but the accused, because of the presumption of knowledge of the drug raised under s 37(d) of the Act, could be called upon his defence on a charge of possession of the cannabis.

Thus, the defence evidence had to be considered in the light of the accused having to rebut the possession charge. We are aware that the learned judge had stated, 'The accused had failed on a balance of probabilities to raise any reasonable doubt in the case of the prosecution that had been proved beyond reasonable doubt.' There was, however, ample evidence to show that the accused had not raised any reasonable doubt on the case of the prosecution that he was carrying a bag on the day and time mentioned in the charge and that the bag contained the cannabis. His defence that he was under the impression he was carrying cigarettes for sale was rejected by the trial judge and we agree that his defence on a balance of probabilities did not rebut the presumption of knowledge under s 37(d) of the Act that he knew the nature of the material he was carrying was cannabis.

We are of the view that bearing in mind the various infirmities of the case, the justice of the case does not allow us to consider s 60 of the Courts

of Judicature Act 1964 to sustain the conviction on the trafficking charge. But there was ample evidence to sustain a conviction for possession in the cannabis under s 6 read together with s 39A(2)(f) of the Act and accordingly we reduced the charge and convicted him on the reduced charge. We sentenced him to 14 years' jail from the date of arrest and ten strokes of the rattan.

Appellant convicted on a reduced charge of possession of cannabis under s 6 read with s 39A(2)(f) of the Dangerous Drugs Act 1952 and sentenced to 14 years' imprisonment and ten strokes of the rotan.

Reported by Andrew Christopher Simon